IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1979

NO. 79-537

REV. PAUL A. McDANIEL, CITIZENS FOR COURT MODERNIZATION, INC., AND JOHN S. GANNON,

Petitioners,

v.

SELMA CASH PATY, ET. AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

FREDERIC S. LeCLERCQ
1505 West Cumberland
Knoxville, Tennessee 37916

J. THOMAS MANN
THOMAS, MANN & GOSSETT
100 West Ninth Street
Chattanooga, Tennessee 37402

Counsel for Petitioners

TENNESSEE LAW PRINTERS, P. O. Box 277, Knoxville, Tennessee, Phone 525-4202

9-25-79-75

INDEX

	Page
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT—	
1. The Decisions Below Are Inconsistent With A Proper Interpretation of 28 U.S.C. §§ 1983, 1988, 1973l(e)	7
2. The Decisions Below Deny Access to State Courts by Persons Asserting Federal Civil Rights Claims And Undermine Important Policies of Federalism	9
3. This Petition Raises Important Questions of Federal Law Which Have Not Been, But Should Be, Authoritatively Resolved By This Court	12
CONCLUSION	13
APPENDIX A—Opinion and Judgment of Tennessee Court of Appeals for Middle Section at Nashville, filed March 30, 1979	14
APPENDIX B—Per Curiam Denial of Certiorari By Tennessee Supreme Court, July 2, 1979	23
APPENDIX C—Opinion and Judgment of Tennessee Court of Appeals for Western Section Sitting at Knoxville, filed July 3, 1979	24
APPENDIX D—Per Curiam Order of Tennessee Supreme Court Denying Application for Permission to Appeal, filed September 4, 1979	28

APPENDIX E—Memorandum Opinion of The Chancery Court of Hamilton County, Tennessee, filed December 21, 1978 29

CITATIONS

Cases:

Albert v. Daniel,
25 Ill. App.3d 291, 323 N.E.2d 110 (1974) . . . 10

Aldinger v. Howard,
427 U.S. 1, 18 (1976) 7

Anderson v. East Street Theatre Corp.,
63 A.2d 649 (M.C.A.D.C. 1943) 10

Ashley v. Curtis,
408 N.Y.S. 2d 858, 861-863 (Sup. Ct., Stuben Co., 1978) 11

Board of Trustees, et.al. v. Holso,
584 P.2d 1009 (Wyo. 1978) 11

Brown v. Pitchess,
119 Cal.Rep. 204, 531 P.2d 772 (1975) 10

Chamberlain v. Brown,
223 Tenn. 25, 442 S.W.2d 248 (1969) . . 6, 7, 11, 12

Chapman v. Houston Welfare Rights Organization,
___ U.S. ___, 99 S.Ct. 1905 (1979) 7, 8

Citizens for Court Modernization, Inc., et.al. v. Blanton, et.al.,
Appendix A 2, 6, 8, 9, 12

Claflin v. Houseman,
93 U.S. 130, 133-37 (1876) 8

Dice v. Akron, C. & Y.R.R.,
342 U.S. 359 (1952) 8, 9

Druck v. Cory,
11 CLEARINGHOUSE REV. 269 (Alaska Super. Ct. 1977)(unreported) 11

Ferdinand v. City of Fairbanks,
11 CLEARINGHOUSE REV. 661 (Alaska Super. Ct. 1977)(unreported) 11

First National Bank v. Bellotti,
435 U.S. 765 (1978) 6

Gayton v. Shanq,
400 N.Y.S.2d 1016 (Sup.Ct. Cattaragus Co.1978) 11

General Oil v. Crain,
209 U.S. 211 (1908) 8

Grubb v. Public Utilities Comm.,
281 U.S. 470 (1930) 8

Gully v. First National Bank of Meridian,
299 U.S. 109 (1936) 9

Harry v. Apache Junction School District,
20 Ariz. App. 561, 514 P.2d 514 (1973) 10

Holt v. City of Troy,
355 N.Y.S.2d 94 (1974) 10

Hutto v. Finney,
437 U.S. 678 (1978) 6, 9

Jones v. Banner Moving and Storage, Inc.,
358 N.Y.S.2d 885, aff'd. in part, mod. in part, 369 N.Y.S.2d 804, 48 A.D.2d 928, 78 Misc. 2d 762 (1974) 10

Kettlewell v. Hot-Mix, Inc.,
566 S.W.2d 663, 668 (Texas Ct. Civ. App. 1st Dist. 1978) 11

McClanahan v. Cochise College,
25 Ariz. App. 13, 540 P.2d 744 (1975) 10

McDaniel v. Paty,
Appendix C 2, 5, 8, 9, 12

Mondou v. New York, NH & HR Co.,
233 U.S. 1 (1876) 8

NAACP v. Alabama,
357 U.S. 449 (1958) 8

NAACP v. Button,
371 U.S. 415 (1963) 10
New Times, Inc. v. Ariz. Board of Regents,
20 Ariz. App. 442, 513 P.2d 960 (1973) 10
Sullivan v. Little Hunting Park,
396 U.S. 229, 238 (1969) 8
Testa v. Katt,
330 U.S. 386 (1947) 8
Tobeluk v. Lind,
589 P.2d 879-81 (Alas. 1979) 11
Travel Agents Malpractice Action Corps. v. Regal Cultural Society, Inc.,
118 N.J. Super. 184, 287 A.2d 4 (1972) 10
Vason v. Carrano,
31 Conn. Sup. 338, 330 A.2d 98 (1974) 10
Vogt v. Nelson,
69 Wis. 2d 125, 230 N.W.3d 123 (1975) 10
Williams v. Horvath,
129 Cal. Rep. 453, 548 P.2d 1125 (1976) . . . 10
Young v. Toia,
403 N.Y.S. 2d 390, 394 (Sup. Ct. Orleans Co. 1977) 11

Statutes:

28 U.S.C. § 1257(3) 2
42 U.S.C. § 1973l(e) 2, 3, 5, 6, 9
42 U.S.C. § 1983 . . . . . 2, 3, 6, 7, 8, 9, 10
42 U.S.C. § 1988 . . . . . 2, 3, 5, 6, 7, 9, 11
T.C.A. § 16-401 1
T.C.A. § 16-413 2
T.C.A. § 2-1932 . . . . . 4, 6
T.C.A. § 2-1933 . . . . . 4, 6
Tennessee Constitution, Art. IX, § 1 3

Tennessee Public Acts, Ch. 848, § 4 (1976) . . . 4
Tennessee Rules of Civil Procedure 24.01(2) . . . 6

S. Judiciary Comm., S.Rep. No. 94-1011, 94th Cong. 2nd Sess. (1976) 9
H.R. Judiciary Comm., H.R. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976) 9

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1979

NO. _____

REV. PAUL A. McDANIEL, CITIZENS FOR COURT MODERNIZATION, INC., and JOHN S. GANNON,

Petitioners,

vs.

SELMA CASH PATY, ET. AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TENNESSEE

Petitioners seek a writ of certiorari to review the judgments of the Tennessee Courts of Appeals in two cases which raise closely related questions of federal law.[1]

---

[1] This single petition is submitted pursuant to Sup. Ct. R. 23(5) and with the prior approval of Supreme Court Clerk Michael Rodak. Francis Lorson to Fred LeClercq, September 18, 1979 (telephone). The two cases for which this petition is filed were decided by "the same court." Sup. Ct. R. 23 (5). The Tennessee Court of Appeals is one court composed of nine judges. TENN. CODE ANN. §16-401. The Court of Appeals

OPINIONS BELOW

The opinion of the Court of Appeals of Tennessee for the Middle Section at Nashville in *Citizens for Court Modernization, Inc., et. al., v. Blanton, et. al.*, was entered March 30, 1979, and is not yet reported. *See* Appendix A. The Tennessee Supreme Court denied the petition for the writ of certiorari on July 2, 1979. *See* Appendix B.

The opinion of the Court of Appeals of the Western Section sitting at Knoxville in *McDaniel v. Paty* was entered July 3, 1979, and is not yet reported. *See* Appendix C. On September 11, 1979, the Tennessee Supreme Court denied petitioner McDaniel's application for permission to appeal taken pursuant to TENN. R. APP. P. 11. *See* Appendix D.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3), in that rights and privileges are claimed under statutes of the United States.

QUESTIONS PRESENTED

Whether state courts are required to entertain claims arising under 42 U.S.C. § 1983.

Whether state courts are required to make awards of attorney fees where appropriate under 42 U.S.C. §§ 1988 and 1973l(e).

... is authorized and empowered to sit in sections of three (3) judges each, at Knoxville, Nashville and Jackson, to hear and determine cases just as though all nine members were present and participating, and the presiding judge of the Court of Appeals shall in such event have the right from time to time, to assign and reassign the judges and sections. TENN. CODE ANN. § 16-413.

Whether the Tennessee Court of Appeals erred in failing to remand both cases for an award of fees in accordance with relevant federal standards.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983. *Civil action for deprivation of rights*. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity or other proper proceedings for redress.

42 U.S.C. § 1988, *as amended*, 42 U.S.C.A. § 1988 (Supp. 1978). *Proceedings in vindication of civil rights*. . . . In any action or proceeding to enforce a provision of section . . . 1983 . . . the court may allow the prevailing party . . . a reasonable attorey's fee as part of the costs.

42 U.S.C. § 1973, *as amended*, 42 U.S.C.A. 1973l(e) (Supp. 1978). *Attorney's fees*. In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs.

TENN. CONST. Art IX, § 1.

"*Ineligibility of ministers and priests to seats in legislature*. —Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or

priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature".

TENN. PUB. ACTS, Ch. 848, § 4 (1976).

"Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a certified copy thereof filed with the Election Commission of the other counties of his representative district".

TENN. CODE ANN. § 2-1932.

Corporate funds — Improper use in election. It shall be unlawful for the executive officers or other representatives of any corporation doing business within this state, to use any of the funds, moneys, or credits of the corporation for the purpose of aiding either in the election or defeat in any primary or final election, of any candidate for office, national, state, county, or municipal, or for the purpose of aiding in the success or defeat of any proposition submitted to a vote of the people, or in any way contributing to the campaign fund of any political party, for any purpose whatever.

TENN. CODE ANN. § 2-1933.

Penalty for improper use of corporate funds. Every executive officer, agent, or other representative of any corporation, doing business within this sate, who shall

knowingly consent to, approve, or aid in the use of the funds of a corporation, for any of the purposes mentioned in § 2-1932 shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000), and shall be imprisoned in the county jail or workhouse not less than two (2) nor more than six (6) months.

STATEMENT OF THE CASE

Following this Court's judgment in *McDaniel v. Paty*, 435 U.S. 616 (1978), Petitioner McDaniel applied in the Chancery Court of Hamilton County for an award of reasonable attorney fees under 42 U.S.C. §§ 1988 and 1973l(e). After a hearing, the Chancery Court awarded Petitioner McDaniel fifteen thousand dollars in attorney fees. Appendix E. The Attorney General of Tennessee appealed the award of fees contending that Tennessee courts lack jurisdiction over claims arising under 42 U.S.C. § 1983 and that Tennessee courts are not obliged to make fee awards under 42 U.S.C. §§ 1988 and 1973l(e).

Petitioner McDaniel cross-appealed contending that the Chancery Court award was inadequate in view of the time and expenses of counsel and other relevant federal standards for determining the amount of fees.

The Court of Appeals for the Western Section sitting at Knoxville reversed the Hamilton County Chancery Court, overruled the award of $15,000 in attorney fees and adjudged costs against Petitioner Paul McDaniel. The Court of Appeals held that Petitioner McDaniel cannot rely on 42 U.S.C. § 1973l(e) "because only one of the Justices of the Supreme Court of the United States,

Mr. Justice White, alludes to voting rights as being infringed upon." Appendix C at 25.

The Court of Appeals held that Tennessee courts are without jurisdiction over claims arising under 42 U.S.C. §§ 1983 and 1988 upon the authority of *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248 (1969).

In *Citizens for Court Modernization, Inc., et.al. v. Blanton, et.al.*, petitioner corporation filed suit on February 21, 1978 in the Chancery Court of Davidson County, Tennessee for relief against the enforcement of TENN. CODE ANN. §§ 2-1932-33 alleging that "plaintiff, plaintiff's president, Jack Gannon, and plaintiff's executive officers and members have been deprived of their fundamental rights of speech, association and voting secured by the First and Fourteenth Amendments of the United States Constitution and further protected by 42 U.S.C. § 1983." Complaint at par. 12. Petitioner corporation requested both declaratory and injunctive relief and, if it prevailed, reasonable attorney fees as provided by 42 U.S.C. §§ 1988 and 1973l(e).

Pursuant to TENN. R. CIV. P. 24.01(2), John S. Gannon, president of petitioner corporation, moved to intervene.

On March 2, 1978, after a hearing, the Chancery Court entered an interlocutory order awarding the relief sought by petitioner but disallowing the claim for reasonable attorney fees. On July 10, 1978, following this Court's decisions in *Hutto v. Finney*, 437 U.S. 678 (1978), and *First National Bank v. Bellotti*, 435 U.S. 765 (1978), petitioners moved that the Chancery Court reconsider its denial of attorney fees to petitioners.

On August 4, 1978, petitioners motion was denied and a final judgment was entered August 28, 1978. The Chancery Court incorporated the declaratory relief entered on March 2, 1978 into its final judgment, denied the motion of Petitioner Gannon to intervene[2] and denied an award of attorney fees.

On appeal, the Court of Appeals affirmed the chancery Court upon the authority of *Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W. 2d 248 (1969), and upon the ground that an award of fees under 42 U.S.C. § 1988 "are strictly within the discretion of the trial court." Appendix A at 20.

REASONS FOR GRANTING THE WRIT

1. THE DECISIONS BELOW ARE INCONSISTENT WITH A PROPER INTERPRETATION OF 28 U.S.C. §§ 1983, 1988, 1973l(e).

Recent dictum suggests that state courts have concurrent jurisdiction over claims arising under 42 U.S.C. § 1983. *Aldinger v. Howard*, 427 U.S. 1, 18 (Rhenquist, J., joined by Burger, C.J., and Stewart, White, Powell and Stevens, J.J.); 36n.17 (Brennan, J., joined by Marshall and Blackmun, J.J., dissenting) (1976). *See also Chapman v. Houston Welfare Rights Organization*, ___ U.S. ___, 99 S.Ct. 1905 (1979). Mr. Justice White

---

[2] The Tennessee Court of Appeals mistakenly stated that "plaintiff has not pursued the appeal on the 'Motion to Intervene and Complaint,'" Appendix A at 17. The Davidson County Chancery Court order of March 2, 1979 granted "an appeal to the Court of Appeals on the denial of the right of John S. Gannon to intervene, and any attorney fees,..." The name of petitioner Gannon was referenced in all pleadings including the "Bill of Exceptions," "Brief of Appellant" and "Short Statement of the Case" in the Court of Appeals and the "Petition for Certiorari" in the Supreme Court. Petitioners assigned as error in the Court of Appeals that the "Davidson County Chancery Court erred in its denial of reasonable attorney fees to **plaintiffs** ..." (emphasis added). Petitioner Gannon has standing in this

observed only last term in *Chapman* that "since 1911, there have been some § 1983 suits not cognizable in district court at all unless they involve the requisite jurisdictional amount under general federal question jurisdiction." 99 S.Ct. at 1943.

At the very least, the Supremacy Clause would appear to preclude state courts from *discriminating* against claims arising under § 1983 as the Tennessee Courts have discriminated against petitioners' claims. *Cf. Sullivan v. Little Hunting Park*, 396 U.S. 229, 238 (1969); *Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359 (1952); *Testa v. Katt*, 330 U.S. 386 (1947); *Grubb v. Public Utilities Comm.*, 281 U.S. 470 (1930); *General Oil v. Crain*, 209 U.S. 211 (1908); *Mondou v. New York, NH & HR Co.*, 233 U.S. 1 (1876); *Claflin v. Houseman*, 93 U.S. 130, 133-36 (1876).

The Tennessee courts *alone* among the state courts have questioned concurrent jurisdiction of state courts over § 1983 claims. *See Chamberlain v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), *Citizens for Court Modernization, Inc., et.al. v. Blanton, et.al.* (Appendix A), and *McDaniel v. Paty* (Appendix C).

The legislative history of the 1976 Act, although not free from ambiguity, suggests that the Congress intended attorney fees to be available to prevailing parties asserting § 1983 claims in the state courts. The 1976 Act was intended

> . . . to authorize the award of a reasonable attorney's fee in actions brought in *State* or federal courts, under certain civil rights statutes. . . . 122 CONG. REC. H 12159 (Oct. 1, 1976) (Mr. Drinan of Massachusetts) (emphasis added).

---

case through his intervention and perfected appeals in the courts below, and, along with other officers and members of the petitioner corporation, as a third party whose rights were asserted by the petitioner corporation. See Complaint filed Feb. 21, 1978 at par. 12 and NAACP v. Alabama, 357 U.S. 449 (1958).

Cf. Dice v. Akron, C. & Y. R.R., 342 U.S. 359 (1952). Disallowance of state jurisdiction would undermine the effective assertion of § 1983 claims in cases such as *McDaniel*. Petitioner McDaniel's § 1983 claim was *not* removable to the federal court under 28 U.S.C. § 1441 because it was asserted as a defense and did not arise on the "face of the complaint." *See Gully v. First National Bank of Meridian*, 299 U.S. 109, 113 (1936).

The Tennessee Court of Appeals in *Citizens for Court Modernization*, Appendix A at 19-21, has obviously misinterpreted the scope of judicial discretion with respect to awards of fees under 42 U.S.C. §§ 1988 and 1973l(e). *See* S. Judiciary Comm., S.Rep. No. 94-1011, 94th Cong. 2nd Sess. (1976), and H.R. Judiciary Comm., H.R. Rep. No. 94-1558, 94th Cong., 2nd Sess. (1976).

The importance of the legislative history in the interpretation of the Civil Rights Attorney's Fee Awards Act of 1976 has been well established. *Hutto v. Finney*, *supra*, 437 U.S. at 700.

2. THE DECISIONS BELOW DENY ACCESS TO STATE COURTS BY PERSONS ASSERTING FEDERAL CIVIL RIGHTS CLAIMS AND UNDERMINE IMPORTANT POLICIES OF FEDERALISM.

Assuring plaintiffs a choice of forum in civil rights actions between state and federal courts enhances the effectiveness of the vindication of federally secured rights, a substantial, if not compelling, interest deserving protection of this Court. For reasons of cost, convenience or sympathetic vindication of federal rights, persons asserting claims under 42 U.S.C. § 1983 may sometimes prefer to file in state rather than federal courts. Because § 1983 constitutional claims are often interwoven with unresolved

questions of state law, the filing of such claims in state court spares federal judges the difficulty of having to resolve questions of state law which can definitively be resolved only by state courts. State court filing avoids the protracted delays and excessive expenses which inevitably follow in the wake of abstention. Moreover, when the erstwhile federal plaintiff is remitted to the state courts for resolution of unclear questions of state law, the plaintiff may choose for reasons of convenience and economy to assert his federal, as well as his state claims, in the state court. *See NAACP v. Button*, 371 U.S. 415 (1963).

While most § 1983 claims are filed in federal court, § 1983 claims are sometimes filed in state courts, and state courts have generally accepted jurisdiction over such claims. *See Jones v. Banner Moving and Storage, Inc.*, 358 N.Y.S.2d 885, *aff'd. in part, mod. in part*, 369 N.Y.S.2d 804, 48 A.D.2d 928, 78 Misc. 2d 762 (1974); *Holt v. City of Troy*, 355 N.Y.S.2d 94 (1974); *Parry v. Apache Junction School District*, 20 Ariz. App. 561, 514 P.2d 514 (1973); *Albert v. Daniel*, 25 Ill. App.3d 291, 323 N.E.2d 110 (1974); *Travel Agents Malpractice Action Corps. v. Regal Cultural Society, Inc.*, 118 N.J. Super. 184, 287 A.2d 4 (1972); *Vogt v. Nelson*, 69 Wis. 2d 125, 230 N.E.2d 123 (1975); *Williams v. Horvath*, 129 Cal. Rep., 453, 548 P.2d 1125 (1976); *Brown v. Pitchess*, 119 Cal. Rep. 204, 531 P.2d 772 (1975); *McClanahan v. Cochise College*, 25 Ariz. App. 13, 540 P.2d 744 (1975); *New Times, Inc. v. Ariz. Board of Regents*, 20 Ariz. App. 442, 513 P.2d 960 (1973); *Vason v. Carrano*, 31 Conn. Sup. 338, 330 A.2d 98 (1974); *Anderson v. East Street Theatre Corp.*, 63 A.2d 649 (M.C.A.D.C. 1943).

There are few reported state court cases involving claims for attorney fees under 42 U.S.C. § 1988. However, such claims have been recognized in some states. *See Board of Trustees, et.al. v. Holso*, 584 P.2d 1009 (Wyo. 1978). *See also Tobeluk v. Lind*, 589 P.2d 873, 881 (Alas. 1979) (Rabinowitz, J., joined by Boochever, C.J., dissenting in part). Attorney fees under §1988 were also awarded in *Ferdinand v. City of Fairbanks*, 11 CLEARING HOUSE REV. 661 (Alaska Super. Ct. 1977) (unreported) and *Druck v. Cory*, 11 CLEARINGHOUSE REV. 269 (Alaska Super. Ct. 1977) (unreported). Other state courts have recognized an obligation to award fees under 42 U.S.C. § 1988 either expressly or by implication but have denied fees because the plaintiff was unsuccessful. *See Kettlewell v. Hot-Mix, Inc.*, 566 S.W.2d 663, 668 (Texas Ct. Civ. App. 1st Dist. 1978); *Tobeluk v. Lind*, *supra* 589 P.2d at 879-81 (Alas. 1979); *Ashley v. Curtis*, 408 N.Y.S. 2d 858, 861-863 (Sup. Ct., Stuben Co., 1978). *Cf. Gayton v. Shanq*, 400 N.Y.S.2d 1016 (Sup. Ct. Cattaragus Co. 1978). *But see Young v. Toia*, 403 N.Y.S. 2d 390, 394 (Sup. Ct. Orleans Co. 1977).

Vindication of § 1983 claims in state courts also reduces the heavy docket pressures in the federal courts and enables state courts to bear a fairer share of the burgeoning civil rights litigation. Moreover, state sensibilities are not as apt to be aroused by vindication of federal claims by *state* courts.

The substantive relief afforded petitioner Citizens for Court Modernization, Inc., by the Davidson County Chancery Court plaintly justified plaintiff's choice of forum. But both the Davidson County Chancery Court and the Tennessee Court of Appeals felt constrained to abide by the *Chamberlain* doctrine and the Tennessee Supreme Court was unwill-

ing in *Citizens for Court Modernization* or in *McDaniel* to review and repudiate the misconception of federal law in *Chamberlain*.

3. THIS PETITION RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, AUTHORITATIVELY RESOLVED BY THIS COURT.

This petition for certiorari should be granted because it raises important questions of federal policy never before decided by this Court concerning the right of access of federal civil rights claimants to state courts. The *Chamberlain* doctrine which compelled the decisions of the Tennessee Court of Appeals deserves to be re-examined in the light of recent Supreme Court cases canvassing the history and purposes of § 1983. The award of fees by the Hamilton County Chancery Court, Appendix E, likewise deserves reconsideration in the light of controling federal standards established in the Senate and House Committee Reports on the 1976 Civil Rights Attorney Fees Awards Act.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgments and opinions of the Tennessee Courts of Appeals.

Respectfully submitted,

FREDERIC S. LE CLERCQ,
1505 West Cumberland Avenue,
Knoxville, Tennessee 37916

J. THOMAS MANN,
THOMAS, MANN & GOSSETT,
100 West Ninth Street,
Chattanooga, Tennessee 37402,

Counsel for Petitioners.

September 20, 1979

APPENDIX A

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

CITIZENS FOR COURT MODERNIZATION, INC.,
Plaintiff-Appellant

vs.

RAY BLANTON, Governor of Tennessee; BROOKS McLEMORE, Attorney General of Tennessee; THOMAS H. SHRIVER, Davidson County District Attorney,
Defendants-Appellees

DAVIDSON EQUITY

APPEALED FROM THE SEVENTH CHANCERY DIVISION, PART I, FOR DAVIDSON COUNTY, TENNESSEE

HONORABLE BEN H. CANTRELL, CHANCELLOR

FILED: MAR 30 1979

FREDERIC S. Le CLERCQ
1505 W. Cumberland Avenue
Knoxville, Tennessee
ATTORNEY FOR PLAINTIFF-APPELLANT

WILLIAM M. LEECH, JR.,
Attorney General
450 James Robertson Parkway
Nashville, Tennessee

KENNETH R. HERRELL
Assistant Attorney General
450 James Robertson Parkway
Nashville, Tennessee
ATTORNEYS FOR DEFENDANTS-APPELLEES

AFFIRMED

SAMUEL L. LEWIS
JUDGE

[2]

CITIZENS FOR COURT MODERNIZATION, INC.,
Plaintiff-Appellant

vs.

RAY BLANTON,
Governor of Tennessee,
BROOKS McLEMORE,
Attorney General of Tennessee
THOMAS H. SHRIVER,
Davidson County District Attorney
Defendants-Appellees

DAVIDSON EQUITY

OPINION

Plaintiff filed suit in the Chancery Court for Davidson County, pursuant to T.C.A. § 23-1102, seeking a declaratory judgment as to whether provisions of T.C.A. §§ 2-1932 and 2-1933 would prohibit plaintiff from soliciting the views of its members as to whether it should take any stand on the judicial article recommended by the 1977 Constitutional Convention for adoption by the people of Tennessee in the referendum held on March 7, 1978. Plaintiff alleged that it had a right under the first and fourteenth amendments to the Constitution of the United States to solicit such views.

Defendants, pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure, moved the Court to dismiss the plaintiff's action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

Plaintiff moved for summary judgment on the ground that there was no genuine issue as to any material fact and that plaintiff was entitled to judgment as a matter of law. Further, John S. Gannon, President of the Plaintiff Corporation, filed a "Motion to Intervene and Complaint."

Prior to the hearing the parties reached an agreement as to settlement on certain paragraphs in plaintiff's complaint.

[2]

The Chancellor, in his Order of February 24, 1978, held that the plaintiff is constitutionally protected in its right to use corporate funds to poll its members on whether they favor or oppose the proposed judicial article, that

plaintiff's right to use corporate funds to solicit its members to assent for their dues or other voluntary contributions to be used for the purpose of aiding in the success or defeat of a candidate or proposition submitted to a vote of the people in this or future elections is constitutionally protected; that the right of officers and members of plaintiff corporation to use the proceeds of its separate political fund of voluntary contributions or earmarked dues of assenting members for any lawful political purposes is constitutionally protected; that no prosecution may lawfully be brought against plaintiff under T.C.A. §§ 2-1932 and 2-1933 for engaging in the constitutionally protected activities described above; and that attorney fees are not a proper award in this case.

Plaintiff then moved for a reconsideration of the denial of reasonable attorney fees. The Chancellor denied the motion and judgment was rendered accordingly.

Plaintiff appealed on the denial of the "Motion to Intervene and Complaint" and on the issue of attorney fees. the plaintiff has not pursued the appeal on the "Motion to Intervene and Complaint." The defendants excepted to the action of the Court in finding and holding "that the right of the plaintiff to use corporate funds to poll its members on whether they favor or oppose the Judicial Article in the election of March 7, 1978 is constitutionally protected by the rights of speech, association in [sic] [and] voting secured by 42 U.S.C. § 1983 . . ."

Two questions are raised on appeal:

1. Do the courts of this State have concurrent jurisdiction with the Federal Courts of claims arising under 42 U.S.C. § 1983?

[3]

2. Are State courts compelled to award attorney fees in cases where such awards are appropriate under 42 U.S.C. §§ 1983 and 1973l(e)?

While other jurisdictions have consistently held that state courts have concurrent jurisdiction over 42 U.S.C. § 1983 actions, see *Long v. District of Columbia*, 469 F.2d 927 (D.C. Cir. 1972); *Houston v. Moore*, 18 U.S. (5 Wheat.) 125-27, 5 L.Ed. 19; *Kish v. Wright*, 562 P. 2d 625 (Utah 1977); *Ammlung v. City of Chester*, 355 F. Supp. 13 (D.C. Penn. 1973), affd. 494 F.2d 833 (3rd Cir. 1974), our Supreme Court, in *Chamberlin* [sic] *v. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969), has held to the contrary.

In *Chamberlin* [sic], the Court of Appeals had held that there was no basic policy consideration which would prevent a state court from trying a tort action predicated on the federal civil rights laws (42 U.S.C.A. §§ 1983 and 1985(3)) where the plaintiff is willing to have the state court do so and selects the forum.

On appeal, Mr. Justice Creson, speaking for the Court, said:

[1] To the contrary, after considering the Congressional Records pertinent to this legislation which disclose its historical background, the temper of the times and climate of opinion held and expressed in this regard, we are firmly convinced that there is abundant indication that these statutes creating this action were directed to the federal trial forum, not the respective states. In any event, no policy of this State can be found in its history, judicial or otherwise,

that would require the judicial branch of the government of Tennessee to entertain such action. *Id.* at ___, 442 S.W.2d at 250.

He went on to set out the legislative history of the act in detail and then:

In view of the historical examination given R.S. §1979 [42 U.S.C.A. §§ 1983, 1985(3)] by the United States Supreme Court, and in the light of the interpretation given that section, it would be illogical indeed to hold that a State court should enforce, or is required to enforce an alleged cause of action which owes its very existence to congressional recognition of reluctance or refusal of State courts to act. *Id.* at ___, 442 S.W.2d at 252.

[4]

Chamberlin [sic] is the law enunciated by our Supreme Court, and the trial courts and this court are bound to follow that law until such time as the Supreme Court or the Legislature changes it.

In any event, the plaintiff here has obtained the basic relief that it desired, i.e., a legal determination of the declaratory judgment act that it could use its corporate funds to solicit its members to determine whether they wanted to take any stand on the proposed judicial article being submitted to the people for consideration in a referendum without running the risk of violating T.C.A. §§ 2-1932 and 2-1933.

As to the second issue, even if the Chancellor had taken jurisdiction and "vindicated rights secured by 42 U.S.C. § 1983," plaintiff would not have automatically been entitled to resonable attorney fees. The federal statutes

relied upon by plaintiff state that the award of attorney fees are strictly within the discretion of the trial court. *See*

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to

[5]

enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, ***the court, in its discretion, may allow the prevailing party***, other than the

United States, ***a reasonable attorney's fee as part of the costs***. (emphasis added). As amended Pub.L. 94-559, § 2, Oct. 19, 1976, 90 Stat. 2641.

and

§ 19731. Enforcement proceedings

Attorney's fees

(e) In any action or proceeding to enforce the voting guarantee of the fourteenth or fifteenth amendment, ***the court, in its discretion, may allow the prevailing party***, other than the United States, ***a reasonable attorney's fee as part of the costs***. (emphasis added). As amended Pub.L. 94-73, Title II, § 207, Title IV, § 402, August 6, 1975, 89 Stat. 402, 404.

Thus, 42 U.S.C. §§ 1988 and 19731(e) are not authority for a mandatory award of attorney fees.

The awarding of attorney fees is a matter generally within the discretion of the trial court.

In *Riley v. Riley*, 9 Tenn. App. 643 (1929), this court stated:

The rule in Tennessee on the question of allowance of attorney's fees by the nisi pruis courts is that the allowance made will not be interferred with by appellate courts, unless some injustice has been perpetrated, such matters being largely within the discretion of the lower courts. Bank v. Wood, 125 Tenn. 6; Bank v. Buckingham, 144 Tenn. 344. *Id.* at 644.

In *Bank v. Wood*, 125 Tenn. 6, 140 S.W. 31 (1911), our Supreme Court stated:

We are not disposed to interfere with the allowance of attorneys' fees in the lower court, unless we can see that some injustice has been perpetrated. Such matters are to a great extent within the discretion of the court, and we will not interfere with the exercise of that discretion unless we think that allowance is materially wrong. *Id.* at 17, 140 S.W. at 34.

We have reviewed the record in this proceeding and examined in depth the arguments of counsel at trial concerning the question

[6]

of attorney fees. The record reveals no error in the exercise of discretion on the part of the Chancellor.

The judgment of the Chancellor is affirmed with costs to by paid by the plaintiff.

/s/ SAMUEL L. LEWIS
SAMUEL L. LEWIS, JUDGE

SHRIVER, P.M., Concurs
TODD, J., Concurs.

APPENDIX B

IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

CITIZENS FOR COURT MODERNIZATION, INC., et al., *Petitioners*	)	DAVIDSON EQUITY
RAY BLANTON, GOVERNOR, et al., *Respondent*	)	

FILED: JUL 2 1979

IN RE: PETITION FOR WRIT OF CERTIORARI OF CITIZENS FOR COURT MODERNIZATION, INC., et al.

Upon consideration of the petition and brief in support thereof of Citizens For Court Modernization, Inc., et al., the reply brief of RayBlanton, Governor, et al., the opinion of the Court of Appeals and the record in the cause,

The writ is denied with concurrence in results only at the cost of petitioners.

PER CURIAM

APPENDIX C

IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION SITTING AT KNOXVILLE

SELMA CASH PATY, ET AL., *Appellant*,
REV. PAUL A. McDANIEL, *Appellee-Appellant*.

Hamilton Equity

Honorable Howell N. Peoples
Chancellor

FILED: JUL 3 1979

Kenneth R. Herrell, Assist. Atty Gen. for the State,
William M. Leech, Jr., Attorney General of counsel.

Frederic S. LeClercq of Knoxville for McDaniel.

REVERSED, DISMISSED

Opinion filed:

MATHERNE, J.

Having successfully defended a lawsuit which challenged his right to be elected delegate to the 1977 Limited Constitutional Convention for the State of Tennessee,[1] the defendant, Reverend Paul McDaniel, made a motion in the Chancery Court sitting in Hamilton County, Tennessee for an award

[1]See McDaniel v. Paty, 435 U.S. 618, 55 L. Ed. 2d 593, 98 S. Ct. 1322 (1978) which reversed Paty v. McDaniel (Tenn. 1977) 547 S.W.2d 897.

of reasonable attorney's fees as allowed under 42 U.S.C. § 1988. The chancellor granted an award of $15,000 attorney's fees to Reverend McDaniel. The State of Tennessee appeals that decision. Reverend McDaniel also appeals on the ground that the amount of the award is inadequate.

The *Paty v. McDaniel* lawsuit was filed in the Chancery Court sitting in Hamilton County, Tennessee. Reverend McDaniel filed in that court his "Counter-Complaint, Cross-Complaint and Third-Party Complaint" wherein among other things he alleged "[t]his cause arises under *Tennessee Code Annotated*, Title 23, Chapter 11, and 42 U.S.C. § 1983." Reverend

[2]

McDaniel, in seeking an award of attorney's fees, relies upon 42 U.S.C. § 1988 which provides that "[i]n any action or proceeding to enforce a provision of sections . . . 1983 . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as a part of the cost." Reverend McDaniel also relies upon 42 U.S.C. § 1973 l (e) which provides that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."

We hold that Reverend McDaniel cannot rely upon 42 U.S.C. § 1973 l (e) because only one of the Justices of the Supreme Court of the United States, Mr. Justice White, alludes to voting rights as being infringed upon. As we understand the remainder of the opinions, the Justices based their decisions upon the First Amendment.

The pivotal issue in determining the propriety of an award of attorney's fees under 42 U.S.C. § 1988 is whether the courts of the State of Tennessee have jurisdiction to entertain a lawsuit based upon 42 U.S.C. § 1983. Admittedly, state courts can assume concurrent jurisdiction of lawsuits arising under that statute. See *New Times, Inc. v. Arizona Board of Regents*, (Ariz. App. 1973) 513 P.2d 960. The Supreme Court of Tennessee has, however, declined to assume state court jurisdiction over claims arising under 42 U.S.C. § 1983, holding jurisdiction to be exclusively federal. *Chamberlain v. Brown*, (Tenn. 1969), 422 S.W. 2d 248. That holding has been followed in *Citizens for Court Modernization, Inc. v. Ray Blanton, Governor, et al.*, Court of Appeals of Tennessee, filed at Nashville, March 30, 1979, wherein it is stated that "*Chamberlain* is the law enunciated by our Supreme Court, and the trial courts and this court are bound to follow that law until such time as the Supreme Court or the Legislature changes it."

In order to challenge the disqualification of ministers to become candidates for delegate to the Tennessee Constitutional Convention, it

[3]

was not necessary for Reverend McDaniel to assert rights under 42 U.S.C. § 1983 in the original lawsuit of *Paty v. McDaniel*. He could have, in his affirmative actions therein pleaded, attacked the infirmities of the Constitution of Tennessee without relying on 42 U.S.C. § 983. As we read the record of that proceeding, that is exactly what happened. Neither the Chancery Court, the Supreme Court of Tennessee, nor the Supreme Court of the United States so much as even refer to that statute. The issue

was plainly and simply a question of whether the Constitution of Tennessee denied ministers of the gospel rights guaranteed them under the First Amendment to the Constitution of the United States. The fact that the state courts of Tennessee took jurisdiction of that issue does not in any manner infer that those courts also assumed jurisdiction of the lawsuit under a 42 U.S.C. § 1983 claim. We, therefore, hold that the Chancery Court sitting in Hamilton County, Tennessee, was without jurisdiction to entertain Reverend McDaniel's motion for an award of attorney's fees under 42 U.S.C. § 1988.

It results that the decree of the chancellor awarding $15,000 attorney's fee is reversed and the motion for an award of attorney's fee is overruled. The cost of this proceeding in the chancery court and in this Court are adjudged against Reverend McDaniel for which execution may issue, if necessary.

/s/ MATHERNE
MATHERN, J.

/s/ NEARN
NEARN, J. (Concurs

/s/ SUMMERS
SUMMERS, J. (Concurs)

APPENDIX D

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

SELMA CASH PATY, ET AL., *Appellee*	)	
vs.	)	HAMILTON CHANCERY
REVEREND PAUL McDANIEL, *Applicant*	)	

FILED: SEP 4 1979

ORDER

On considering the application for permission to appeal and briefs filed in this case and the entire record, the application of the Reverend McDaniel is denied with concurrence in results only, at cost of the appellant.

PER CURIAM

APPENDIX E

IN THE CHANCERY COURT FOR
HAMILTON COUNTY, TENNESSEE, PART TWO

NO. 51094

SELMA CASH PATY	)
VS.	)
REV. PAUL A. MCDANIEL, ET AL	)

FILED DEC 21 1978

MEMORANDUM OPINION

This cause is pending before the Court on the motion of the defendant and counter-plaintiff, Rev. Paul A. McDaniel, for an award of attorney fees pursuant to 42 U.S.C. Sec. 1988.

The moving party was originally sued in this Court by the plaintiff to prevent the election commission of this County from placing the name of Rev. Paul McDaniel on the ballot as a candidate for delegate to the Constitutional Convention of 1977. An Answer and Counter-Complaint was filed alleging that a provision of the Tennessee Constitution, which prohibits "ministers of the gospel" from holding certain public offices, violated the Constitution of the United States and violated rights guaranteed to McDaniel by 42 U.S.C. Sec. 1983. The trial court

concurred with this contention of defendant McDaniel. On appeal, the Tennessee Supreme Court reversed the trial court, and upheld the provision of the Tennessee Constitution barring ministers from holding certain public offices. *Paty vs. McDaniel*, 547 S.W. 2d 897 (1977). Defendant appealed to the U. S. Supreme Court and on April 19, 1978, the decision of the Tennessee Supreme Court was reversed. *McDaniel vs. Paty*, 98 S.Ct. 1322 (1978)

The State of Tennessee now contends that defendant McDaniel should not be permitted to recover attorney fees since Tennessee Courts are not required to entertain actions to enforce rights

[2]

guaranteed by 42 U.S.C. Sec. 1983, citing *Chamberlain vs. Brown*, 223 Tenn. 25, 442 S.W.2d 248 (1969). That case has no application to the present cause since defendant McDaniel did not initiate this action, but raised the issues of the violation of his rights (pursuant to 42 U.S.C. Sec. 1983) in his Answer and Counter-claim which he was entitled to do under Rule 13 of the Tennessee Rules of Civil Procedure.

The Constitution of the State of Tennessee provides that the Courts of this State shall be open and every man entitled to remedy by due course of law. (Art. 1, Sec. 17) Surely it cannot be questioned today that, as stated by the Court of Appeals in its ruling in *Chamberlain vs. Brown, supra*,

> State Courts are courts of general jurisdiction and as such, have full jurisdiction to try cases predicated on federal statutes, except in areas where Congress has

> expressly limited jurisdiction to federal courts, or where some overriding policy consideration dictates that State court jurisdiction be excluded.

Plaintiff seeks fees and expenses in the amount of $37,005.93. It was stipulated at the hearing of this motion that the numer of hours spent by counsel on this case and the hourly rates charged by counsel were reasonable. It further appears that funds had been raised by public appeal to defray some of the legal fees and expenses leaving a balance requested of $27,671.83.

In view of the nature of this case, the fact that a landmark decision of the United States Supreme Court resulted, and recognizing that counsel undertook representation in this case for a fee, but also as a *pro bono publico* matter, the Court will require the State of Tennessee to pay to counsel for defendant McDaniel the sum of $15,000.00.

[3]

Counsel for defendant McDaniel shall submit an appropriate order.

/s/ HOWELL PEOPLES
CHANCELLOR - PART TWO